

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN C. DEATHERAGE and DEPARTMENT OF JUSTICE, IMMIGRATION
& NATURALIZATION SERVICE, BORDER PATROL,
Freer, TX

*Docket No. 99-566; Submitted on the Record;
Issued November 7, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant could not concurrently receive compensation pursuant to a schedule award and compensation for temporary total disability wage loss.

On June 21, 1991 appellant, then a 29-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on April 23, 1991 he was struck in the neck by a bullet while in the performance of duty.

The Office accepted appellant's claim for an open gun shot wound to the neck, injury to the spinal column and quadriplegia.

On April 28, 1994 appellant filed a claim for a schedule award (Form CA-7).

By decision dated October 17, 1997, the Office granted appellant a schedule award for 100 percent permanent impairment of the right lower extremity, 100 percent permanent impairment of the left lower extremity, 93 percent permanent impairment of the right upper extremity, 93 percent permanent impairment of the left upper extremity and 60 percent permanent penile impairment. This award covered the period October 12, 1997 through April 19, 2022. In a letter dated November 11, 1997, appellant, through his counsel, requested an oral hearing before an Office representative. Appellant contended that he was entitled to concurrently receive schedule award payments and compensation for wage loss.

By decision dated October 13, 1998, the hearing representative affirmed the Office's decision finding that appellant was not entitled to receive schedule award payments because he was receiving disability compensation payments during that time.

Under the Federal Employees' Compensation Act,¹ compensation for disability or physical impairment may be paid in only two situations, pursuant to sections 8105 and 8106, for a loss of wage-earning capacity which an employee sustained because of his injury or pursuant to section 8107 for the permanent loss or loss of use of certain specified members or functions of the body by means of a schedule award.²

Section 8116(a) of the Act contains the following provision:

“While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay or remuneration of any type from the United States, except:

- (1) in return for services actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of title 5, United States Code.”³

In addition, section 10.304(c)(3) of the Act's implementing regulations states that compensation for a schedule award is payable in addition to but not concurrently with compensation for temporary total or temporary partial disability.⁴

As the Board explained in *Joseph R. Waples*, when the statute provides parallel remedies for the same injury, it is not intended that a claimant should receive both remedies at the same time.⁵ Thus, the Board found in that case that the Office properly converted appellant's wage-loss compensation to schedule award benefits and appellant received schedule award payments in lieu of wage-loss compensation.

On appeal appellant does not contest the amount or the period of the schedule award but argues that he is entitled to have his partial disability benefits for wage loss continue while he

¹ 5 U.S.C. §§ 8101-8193.

² *Daniel G. Jones*, 27 ECAB 405, 408 (1973).

³ 5 U.S.C. § 8116(a).

⁴ 20 C.F.R. § 10.304(c)(3).

⁵ 44 ECAB 936, 939 (1993).

receives monetary compensation for his schedule award. The evidence of record does not establish that appellant falls into one of the exceptions in section 8116(a). Thus, as noted above, appellant is precluded from receiving concurrently compensation for wage loss for his partial disability and a schedule award for the same injury under section 8116(a) of the Act. Although the hearing representative found that appellant was not entitled to receive schedule award payments since he was receiving disability compensation payments at that time, it appears that appellant was receiving schedule award payments based on the October 17, 1997 decision. Therefore, the Board finds that appellant is not entitled to receive disability compensation payments concurrently with these schedule award payments.

The October 13, 1998 decision of the Office of Workers' Compensation Programs' hearing representative is hereby affirmed as modified to reflect that appellant was receiving schedule award payments at the time of the hearing representative's decision and that he is not entitled to concurrently receive disability compensation benefits. The Office's October 17, 1997 decision is hereby affirmed.

Dated, Washington, DC
November 7, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member